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C O N S I D E R E D.

THE
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OF THE
L A T E E L E C T I O N
FOR THE
C O U N T Y O F M I D D L E S E X,
CONSIDERED
On the Principles of the Constitution,
AND THE
Authorities of Law.

L O N D O N :

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T H E
C A S E

Of the late ELECTION for the County of MIDDLESEX,

Examined on the PRINCIPLES of the CONSTITUTION,

And the AUTHORITIES of LAW.

THERE is a crisis, when, on certain subjects, the sober remonstrances of truth and reason, are of little avail against the misguided impetuosity of public prejudice.

Happily, however, an intemperance of this kind is generally as transient as it is violent; and, as its rage abates, the minds of the people become open to conviction.

There is a regard due even to the misapprehensions of the public: And no prudent Administration will be inattentive to what is called popular clamour.

Indeed the public opinion is seldom erroneous, when founded on just information: But removed, as the far greater part are, from the source of true intelligence, how easy is it for those who have an interest in imposing on the public, to mislead them by false representations, and alarm them with vain apprehensions?

Impelled by such mistaken motives, how frequently have the people concurred in measures, which tended to defeat the very ends they had in view, and which were ultimately destructive of their own good?

But there is that justice and generosity in the public, not always to be found in individuals. When the people, by candid and temperate arguments, are persuaded that their opinions and apprehensions are groundless, they are ready to renounce them, and to turn their resentment against those who have deceived and misled them.

Later times scarce afford a stronger instance of misapprehension, than that which possesses the minds of some persons, with respect to the late important determination of the election for the county of Middlesex.

As few are acquainted with the true state of this great constitutional question, the writer of these sheets, who has taken some pains to investigate it, thinks it the duty of a good citizen, to submit those reasons and authorities to the judgment of the public, which have brought conviction to his own mind.

To this end, he proposes to shew from the Records of Parliament, and the Authorities of Law, that the House of Commons is legally invested with the power they have exercised with respect to the late determination of the election for Middlesex.

Farther, that, on the general principles of reason and constitutional policy, they ought to have such a power: And that, in the instance in question, they have exercised their power in a just and constitutional manner, not only according to the law and usage of parliament, but in strict conformity with the adjudications in the courts of Westminster, on similar occasions.

That the Reader may be the better able to judge of the arguments tending to prove these propositions, it will be necessary previously to state the proceedings of the House this session, with respect to Mr. *Wilkes*; more especially as the mistakes and misapprehensions, which possess the minds of some, arise from the want of being acquainted with these proceedings, or of considering them with due attention and accuracy.

Mr. *Wilkes*, in the last parliament, was expelled from the House of Commons. Being, moreover, by the verdicts of his country, convicted of crimes, for which infamous punishments have not unfrequently been inflicted, he thought proper to abscond; so that sentence could not then be passed upon him: Whereupon he was outlawed.

On the eve of the general election, he nevertheless appeared in public; and, though an outlaw, was elected one of the Knights of the Shire for the county of Middlesex. His outlawry however was afterwards reversed, and sentence was passed upon him; in pursuance of which, he was committed in execution, to the prison of the King's Bench.

Being in this situation, he himself brought the consideration of his particular circumstances before the House, by his own petition; which occasioned them to call for the Records of the King's Bench, whereby the several convictions against him, and the sentence passed thereon, appeared before the House.

His petition having been heard and determined, he was afterwards charged with a new offence; that of writing a preface to a letter, which had been printed in the public papers: And, in the beginning of February last, being at the Bar of the House of Commons, he confessed himself the author and publisher of the preface under consideration; which the House then resolved to be an insolent, scandalous, and seditious libel: And afterwards came to the following resolution;

“ RESOLVED,

“ That John Wilkes, Esq; a member of this House, who hath, at the
 “ bar of this House, confessed himself to be the author and publisher of
 “ what this House has resolved to be an insolent, scandalous, and seditious
 “ libel: And, who has been convicted in the court of King’s Bench, of
 “ having printed and published a seditious libel, and three obscene and im-
 “ pious libels, and by the judgment of the said court, has been sentenced
 “ to undergo twenty-two months imprisonment, and is *now in execution*
 “ under the said judgment, be expelled this House.”

Whereupon it was

“ ORDERED,

“ That Mr. Speaker do issue his warrant to the Clerk of the Crown, to
 “ make out a new writ for the electing a Knight of the Shire to serve in
 “ this present parliament, for the county of Middlesex, in the room of
 “ John Wilkes, Esq; expelled this House.”

Mr. Wilkes, however, being nevertheless returned, the House, on the 17th of February 1769, came to the following resolution :

“ RESOLVED,

“ That John Wilkes, Esq; having been, in this session of parliament,
 “ expelled this House, was, and is, *incapable of being elected* a member
 “ to serve in this *present parliament*.”

It appearing to the House, that there was no other candidate at the last election, it was resolved, farther, That it was a void election: And it was

“ ORDERED,

“ That Mr. Speaker do issue his warrant to the Clerk of the Crown, to
 “ make out a new writ, for the electing a Knight of the Shire to serve in
 “ this present parliament, for the county of Middlesex, in the room of
 “ John Wilkes, Esq; who is *ADJUDGED incapable of being elected* a mem-
 “ ber to serve in *this present parliament*, and whose election for the said
 “ county has been declared void.”

A great part of the Freeholders of Middlesex, however, being influenced by a mistaken bias, obstinately persisted in their choice, and Mr. Wilkes was again returned. Whereupon the House *resolved* the *Election* and *Return* of Mr. Wilkes, to be null and void; and, no other candidate appearing to the House, they ordered a new writ.

At the next election, Mr. Wilkes, notwithstanding the resolutions of the House, was again named as a candidate, and returned.

Whereupon the House again resolved the election of Mr. *Wilkes* to be null and void. But, it appearing to the House that there were other candidates, they ordered the poll to be brought before them; and it appearing on the face of the poll, that, of the candidates capable of being elected, Mr. *Lutterell* had the majority, they *resolved*, that Mr. *Lutterell* ought to have been returned, and ordered the return to be amended, by inserting his name in the room of Mr. *Wilkes*: At the same time, they allowed the usual liberty for any party to petition on the merits of the election.

In consequence of this, fifteen Freeholders did prefer a petition; and on hearing the merits of that petition, the House *resolved*, that Mr. *Lutterell* was duly elected.

In order to shew that the House of Commons is legally invested with the power they have exercised on this occasion, it will be necessary to explain the nature and extent of the powers constitutionally vested in that House.

To preserve the equal poise, which the jealousy of our constitution has endeavoured to settle, the three orders of the state are invested with separate, as well as conjunct powers.

The power of Legislation is joint; and there can be no act of *Legislation*, which has not received the consent of the *three Estates*: But besides their *legislative* power, each House has a *judicial* capacity, for the maintenance, among other purposes, of its own authority and independence. The Peers, in their House, as Lord *Coke* says, have power of judicature, and the Commons, in their House, also have power of judicature: And farther, as he adds, both Houses together, have power of judicature*; and, for this, he refers to the Records of both Houses.

The rule, and only rule, by which their power of judicature is directed, is the *Law of Parliament*: which, as will appear, is part of the *Law of the Land*.

As every court of justice, says Lord Coke †, hath laws and customs for its direction, some by the common law, some by the civil and canon law, some by peculiar laws and customs, &c. so the *high court of Parliament* subsists by its own proper Laws and Customs.

It is declared by the Records of Parliament, that all weighty matters moved concerning the Peers of the Realm, ought to be determined, *adjudged* and discussed by the *course of Parliament*, and not by the civil law, nor yet by the common laws of the land, used in other courts of the realm ‡.

The same declaration, for the like reason, says Lord Coke, respects the *Commons*, for any thing done or moved in their House: And this is the reason, he adds, why the judges ought not to give any opinion of a matter of Parliament, because it is not to be decided by the common law, but according to the law and custom of Parliament; and so the Judges (he concludes); in divers Parliaments have confessed *.

Thus it appears, not only from the several declarations of the judges of the Land, at different times, but from the authority of the Records themselves §, that there is a *Law of Parliament*, which, in matters thereby cognizable, is distinct from, and independent of all other laws; but is, nevertheless, a branch of the *Law of the Land*.

The *Law of Parliament* is as much the *Law of the Land*, as the *Common Law*, or any other branch of the *general Law*, which governs in this realm. Lord Coke, enumerating the several branches of which the Law of the Realm consists, mentions the *Law of Parliament* as second in order.

Cooper, afterwards Lord Cooper, in his speech in the case of *Ashby and White*, says, the *Law and Custom of Parliament* is a part of the *Law of the Land*, and, as such, OUGHT TO BE TAKEN NOTICE OF BY ALL PERSONS.

Lord Chief Justice Holt, in his argument concerning the granting of a *Habeas Corpus* to the *Ailesbury men*, says, “We are bound to take notice of the Customs of Parliament, for they are a part of the *Law of the Land*; and there are the same methods of knowing it, as of knowing the law in Westminster-hall.—In another place, he says, The *Law and Custom of Parliament*, is as much the *Law of the Land*, as any other law.

† 4 Inst. 14.

‡ 11 R. 2. n. 7.

* By the record of Parliament 31 H. 6. n. 27. the judges being consulted concerning the release of some members of the Commons, who had been imprisoned in the vacation, they answered, “That it was not their part to judge of the Parliament, which was Judge of the Law.”

§ The Records of Parliament, as Lord Coke observes, are the truest histories.

The same language is held by *Hale, Petyt, Whitlocke, &c.* and will be found, in the course of these sheets, to have been pronounced, from time to time, by the Courts of Justice. In short, all who have ever written, or spoken on this subject, have treated the *Law of Parliament*, as part of the *Law of the Land*, and as a law which all persons are bound to take notice of.

It is by this law, and by this only, that the House of Commons regulate their proceedings, with respect to the various subjects of the jurisdiction they exercise.

The *Law of Parliament* may be considered as composed of two branches :
1. The rules, orders, customs, and course of the House, with their expositions of, and decisions upon the Law, with respect to matters within their jurisdiction.

The customs, course, and common judicial proceedings of a court, are the *Law of the Court*, of which the common Law takes notice, without alledging or pleading any usage or prescription to warrant them*.

That the course of any particular Court is a Law, and that the determinations of a Court make part of the Law of the Land has been held from the earliest times, so far back even as the Year Book of 11 E. 42 b.

Thus the rules, orders, and course of the *House of Commons*, with their exposition and decisions on matters cognizable before them, are as much the Law of the Land, as the rules and orders of the Court of *King's Bench*, or any other Court, with *their* determinations, are the Law of the Land. Nay such proceedings and decisions of the House of Commons, are in truth more binding than those of the Courts at Westminster, because from the former there lies no appeal, and it is essential, as will be shewn, to the preservation of Public Liberty, that no appeal should lie.

2. The second branch, composing the Law of Parliament, consists of the *Statute Law* of the realm, so far as the same regards the House of Commons, or the jurisdiction thereof.

It will not be material, on the present occasion, to enquire into the various subjects over which the jurisdiction of the House of Commons extends. It will be sufficient, with regard to the question now under consideration, to

shew not only from the authorities of the most ancient and respectable lawyers, but from the Records of Parliament*, that the House of Commons—

1. Have the sole and exclusive power of punishing their own members, as *such*; either by commitment, suspension, expulsion, or otherwise.
2. That they have the sole and exclusive power of examining and determining the rights and qualifications of Electors and Elected, together with the returns of writs for the election of members, and in short all matters incidental to such elections.

1. As to their power of punishing their own members, by commitment, *Suspension*†, or *Expulsion*‡, &c. the instances of the exercise of those powers are innumerable, and the occasions on which it has been exercised are various.

With

* The Journals of the House of Commons are Records, and mentioned as such 6 H. 8. c. 16.

† MEMBERS SUSPENDED.

| <i>Names.</i> | <i>For what.</i> | <i>Time when.</i> |
|---------------------|---|-------------------|
| Mr. Payne, | { For an offensive speech: and complained of as a purveyor, &c. Suspended till the doubt be cleared, } { Whether he might serve. } | 3d April 1604. |
| Mr. Baber, | { For granting warrants for billeting soldiers.—Suf- } { pended during pleasure, } | 9th April 1628. |
| Sir Jo. Jacob, | { For monopoly.—Suspended till his cause be heard, } | 21 Nov. 1640 |
| Mr. Hollis, | { For offensive words.—Suspended during that session of } { Parliament, } | 26 April 1641 |
| Mr. Phillips, | { For sitting in the pretended High Court of Justice, } { &c.—Suspended till Committee report, and House } { give judgment, } | 27th June 1661. |
| Mr. Love, | { For not communicating—Suspended till he bring } { certificate of having communicated, } | 3d July 1661. |
| Sir Wm. Penn, | { For fraud and embezzlement.—Suspended while im- } { peachment depending against him, } | 21 April 1668. |
| Sir John Prettiman, | { For imposing on the House, with regard to the pro- } { tection of his servant Robert Humes.—Suspended } { till he shall produce Robert Humes, } | 8th April 1670. |
| Mr. Culliford, | { For several misdemeanours.—Suspended till he at- } { tend to answer, } | 8 March 1692. |

‡ MEMBERS EXPELLED.

| <i>Names.</i> | <i>For what.</i> | <i>Time when.</i> |
|------------------------------------|--|-------------------|
| Arthur Hall, | { For a scandalous libel, derogatory to the authority of } { the House, &c. } | 14th Feb. 1580. |
| St. John Bernet, | For bribery, - - - - - | 23d April 1621. |
| William Sandys, | { For monopoly, - - - - - } | 21th Jan. 1640. |
| Sir Jo. Jacob, and Thomas Webb, | | |

Mr. Taylor,

With regard to commitments, their power will not be disputed : But with respect to *Suspensions* and *Expulsions*, more especially the latter, some, with what reason will be seen hereafter, have affected to call it in question.

It appears from the list in the note underneath, that the House have suspended their members sometimes during pleasure, sometimes till the member suspended does a certain act, or till something depending be determined ; and, at other times, during that particular session of Parliament : And the causes of these suspensions, it is seen, are as well for offences committed without the House, as within it.

With respect to *Expulsions*, they are much more numerous than *Suspensions*. In the earlier times, before the parliamentary stile had acquired that accuracy which it has since attained, we find this sentence variously expressed. Sometimes it is that the member be severed and cut off ; sometimes, that he be removed ; at other times, that he be discharged, and at other times that he be put out ; which are only so many synonymous expressions signifying *Expulsion* :—And the word *Expelled*, has for more than a century past been constantly used on these occasions.

From the note underneath, the Reader will perceive the various causes for which this sentence has from time to time been inflicted. Sometimes for offences against *Religion*, sometimes for offences against the *State*, sometimes for offences against *Morality*, and at other times for offences against the *House* merely.

| | | | |
|----------------------|---|-------|-------------------|
| Mr. Taylor, | For words impeaching the justice of the House, | - | 27th May 1641. |
| Mr. Benfon, | For selling protections, | - - - | 2d Nov. 1641. |
| Mr. Ashburnham, | For receiving 500 l. from French merchants, | - | 22d Nov. 1677. |
| Mr. Sackville, | For aspersing the king, | - - - | 25th March 1679. |
| Sir Francis Wythers, | { For presenting an address to his Majesty, expressing an abhorrency to petition his Majesty for calling Parliaments, | | 29th Oct. 1680. |
| Sir Robert Peyton, | For secret negociation with the Duke of York, | - | 14th Dec. 1680. |
| Sir Hen. Furness, | { For breach of duty, as trustee for circulating exchequer bills under the 5 and 6 W. and M. | | 19th Feb. 1700. |
| Mr. Asgill, | { For being the author of a book, containing many <i>profane and blasphemous</i> expressions | | 18th Dec. 1707-8. |
| Mr. Ridge, | For fraud as a contractor, | - | 15th Feb. 1710. |
| Mr. Walpole, | For breach of trust and corruption, | - | 17th Jan. 1711. |
| Mr. Steele, | For a <i>scandalous and seditious libel</i> , | - - - | 18th March 1713. |
| Mr. Pryse, | For a contempt of the House, | - - - | 23d March 1715. |

For other instances, the Reader may refer to the Journals of 10 May 1571, 3 March 1620, 21 Jan. 1623, 21 Jan. 1640, 2 Feb. 1640, 27 May 1641, 30 Oct. 1641, 9 Dec. 1641, 2 Feb. 1641, 9 March 1641, 12 May 1642, 10 Aug. 1642, 11 June 1660, 21 April 1668, 1 Feb. 1677, 25 March 1679, 28 Oct. 1680, 13 May 1689, 12 March 1694, 26 March 1695, 1 Feb. 1697, 20 Feb. 1698, 22 Feb. 1698, 15 April 1701, 1 Feb. 1702, 19 Feb. 1711, 10 Jan. 1715, 22 Jan. 1716, 23 Jan. 1720, 28 Jan. 1720, 8 March 1720, and many others.

But

But however various the causes of Expulsion may have been, the effect of it is constantly the same: For, the *necessary* consequence of Expulsion is, that the person expelled shall be incapable of being elected again to serve in the same House of Commons that expelled him. This incapacity is implied in the very meaning of the word itself. Should any man of plain sense, nay should any young academician, or school-boy even, be asked what was understood by expelling a man from any society, they would certainly answer, "The meaning is, that he shall never be a member of *that* club, or of *that* college, or of *that* school any more."

Expulsion clearly, *ex vi termini*, signifies a total, and not a partial, exclusion from the society or parliament from whence he is removed. If a member is excluded during pleasure, or for a certain time only, that is, properly speaking, a SUSPENSION, and not an EXPULSION: And the House themselves, as has been shewn, have made the distinction in many cases, by making use of the word *Suspended*, where they meant the exclusion to be temporary; that is, either during pleasure, or for that session, or till some end be attained. But when a member is *expelled*, he is not excluded from the meeting of that day, or of that session, but from *that* Parliament; that is, from that body of which he is a member.

No one, acquainted with the constitution and practice of Parliament, will deny that the House have a right to expel their own members. Indeed their right is established by such immemorial usage, and has been exercised in such a vast multiplicity of instances, that it is impossible to dispute it.

It is not only evident from precedents, that the House have a power of expulsion, but it is clear from the reason of the thing that they ought to have such a power. Otherwise the most unworthy and unfit representatives may sit in Parliament, to the disgrace and detriment of the nation. Since it is not pretended that any such power is, or can be, lodged any where else.

But to admit their right of expelling, and argue that the member expelled may be re-elected that Parliament, is to contend for the grossest absurdity imaginable; it would expose the judicature of the House of Commons to the most flagrant insult and contempt; it would render the determination of the House of Commons, totally nugatory, if the member whom they expelled to-day, should be forced upon them again to-morrow. Should such an extravagant absurdity be once admitted, the determinations of the *House of Commons*, which is a court of judicature, from whence there lies no appeal, would in fact become of less weight and authority than the lowest court now existing.

No man therefore who means to argue seriously and candidly, will contend that a member expelled to-day, is capable of being elected the next day. For by whom is he expelled? Why by the People of Great Britain assembled by their representatives.—And shall a part of the people, shall the electors of a particular county say,—We will not be bound by the judgment of the Majority—We will elect no other to represent us than the person expelled? Shall *they* be at liberty to restore him, who had no power to expel him? Certainly not.

Suppose, for the sake of argument, that the people instead of being assembled by their representatives, had been personally convened. Though in such case every man would have a right of being present at an assembly where his own interest, among that of others, is in agitation, yet will any one say that he may not forfeit that right by indecorum, by treachery, by immorality, &c.? And are not the majority of the assembly the sole judges of his fitness to continue a member? If they judge him incapable, may they not expel him? and can he ever acquire a seat in that assembly again, against the sense of the majority?

It is the same where a member is expelled by the representative body. They whom he represents have no power of obtruding him into the national assembly again, against the sense of the majority. For it is to be observed, that though every member is chosen by a particular county or borough, yet, as is justly observed by Lord *Coke* and others, when in Parliament, he serves for the whole nation. Consequently he ought not to sit in Parliament, against the sense of the majority in that nation, expressed by their representatives.

If, for want of proper information, or due consideration of the nature of the offence, the cause of expulsion should not, in the apprehension of the electors, be sufficient to warrant such a punishment, yet they are nevertheless bound by the determination of the majority in the representative body, to whom they have resigned their right of private judgment in this instance, and who are, and, as will be shewn, ought to be the sole judges in such cases.

Though the House cannot, and God forbid they ever should, say whom the electors shall choose, yet they may declare who by law are *not to be chosen*: And by expelling a member, they declare, without saying more, that he is incapable of being elected for that Parliament.

There cannot be a stronger instance that, in the general sense of mankind, such incapacity is the necessary effect of expulsion, than that of there having never been any attempt made to re-elect one in the same Parliament, out of the very many who have been expelled, except in the single instance
of

of *Robert Walpole, Esq;* and then the House, as will be seen, declared the effect of their vote of expulsion.

This case however has been cited on the other side, in order to destroy the inference, that the incapacity contended for is the necessary effect of expulsion.

But, from the bare state of this case, it will manifestly appear that it proves the direct contrary of the proposition it is cited to establish.

Robert Walpole, Esq; after having been expelled, was re-elected : Upon which the House

“ RESOLVED,

“ That Robert Walpole, Esq; having been, that session of Parliament, expelled the House, *was*, and is incapable of being elected a member to serve in that present Parliament.”

Now, say they, the expulsion did not of itself render him incapable of being re-elected : If it had, there would have been no occasion for such a resolution.

But they who advance this argument must certainly have read the resolution inconsiderately, or they must argue against conviction. The very words of the resolution, if they attend to them, clearly import that the incapacity was *created* by the *expulsion* itself. For what does the resolution say? not simply that he *is* incapable of being elected, but that he *was*, and *is* incapable &c. Was incapable! By what, and when? Why by the operation of the former vote of expulsion, and from the time when that resolution passed. The subsequent resolution does not *create* the incapacity, but (by the word *was*) refers to the incapacity already created, and (by the word *is*) declares that incapacity still to have continuance. So that the last resolution, not being confined to the time present, but referring to the time past, does thereby only explain and expound the meaning and *effect* of the former resolution. Nothing therefore can be more absurd than to urge an opinion from *Implication* only, contrary to that which is declared in *express* words.

Still, however, it is said that the incapacity of being elected is not a necessary consequence of expulsion : And to support this strange proposition, they cite another case of one Richard Woolaston, who was expelled 20 February 1698, and was afterwards re-elected, and served in that Parliament.

But this case, when it is examined, will by no means prove what it is cited to establish. For though the House, somewhat *inaccurately*, used the

word Expelled, yet when the cause of his *anction* is considered, it will appear that his incapacity was of a temporary nature.

The question put at that time was, “ That Richard Woolaston, Esq; being a member of the House of Commons, and having since been concerned and acted as a receiver of the duties upon houses, and also upon births, &c. contrary to the act made in the fifth and sixth years of his Majesty’s reign, &c. be expelled this House.” Which, upon a division of 184 against 133, was carried in the affirmative.

Thus it appears, from the words of the resolution itself, that the cause of disqualification in this case was merely *temporary*; and the fact is, as appears upon record, that, at the time of his re-election, he no longer held that office: So that he was then unquestionably eligible.

Indeed the House could never be presumed to intend that the effect of their vote should be *permanent*, when the cause, as declared by themselves, was only *temporary*: For the cause of disqualification ceasing, the effect must cease of course. But where the cause of expulsion is permanent, there the effect is permanent likewise, and must operate to exclude him from the body whence he has been expelled, so long as that body exists. No one therefore can pretend that this case is, in any respect, similar to the principal case under consideration.

As little will the case of *Sawyer*, which has been mentioned on the other side, serve to maintain the doctrine which it is cited to prove; that is, That a member expelled is eligible again in *that* Parliament. For, in truth, Sawyer was expelled just before the dissolution of the Parliament, and he was not in fact elected again till the *subsequent* Parliament.

Upon the whole therefore, whether we consider the obvious and common acceptance of the word Expulsion, or the natural inference to be drawn from the common usage and course of Parliament, in such cases, it is manifest that the incapacity of being re-elected, is, and has always been considered as, a necessary effect of expulsion.

As there is no reason however to fear the force of any argument which can be urged against the proceedings of the House in this case, let it be admitted for a while that expulsion does not of itself create an incapacity of being re-elected, yet still it will appear that the House of Commons, not only as expositors of their own resolutions, but as expositors of the *common* and *statute* law of the land, in cases where their jurisdiction is competent, have a right to declare who are, and who are not eligible as members of Parliament. This leads to the consideration of the next proposition; which is —

2d, That they have the sole and exclusive power of examining and determining the rights and qualifications of electors and elected, together with the returns of writs, and all matters incidental to elections.

These rights they have asserted and exercised from time immemorial, and have, with a firmness to which we owe the liberties we now enjoy, withstood and repelled all attempts made either by the Crown, the Peers, or the Courts of Law, to usurp, or in any degree encroach upon, these great and constitutional points of jurisdiction.

Attempts of this kind have been made in various shapes; some, openly and directly; others in a covert and collateral manner. But that the Reader may judge for himself on a subject of such importance, I will state the most material contests relative to matters of jurisdiction, in a full and perspicuous point of view, according to the order in which they occur.

The first time I shall take notice of when the Commons had occasion to assert their right of jurisdiction, was in the *Norfolk Case*, the 29 Eliz. 1586, which is stated in *Carew*, but more satisfactorily in *D'Ewes's Journal* of the House of Commons, and which was shortly thus :

The Sheriff of Norfolk received a writ, for the election of two Knights, but two days before the next county day. By reason of the shortness of time, he could neither summon many Freeholders, nor make due proclamation in the county, any one day before the election. The sheriff, notwithstanding, on the county day, proceeded to the execution of the writ, and Mr. Farmer and Mr. Gresham were duly chosen. After this a second, and new writ, was delivered to the sheriff for a new election, which was executed likewise, without any colour of misfeasance; and thereby Mr. Heydon and Mr. Gresham were duly chosen : And the indenture of their election, with the writ, were delivered to the Clerk of the Crown, together with the writ and indenture of the former election.

The Lord Chancellor and the Judges, at a meeting held on the subject of these elections, held, that the first writ was well executed; that the first election was good, and the second absolutely void. Of this their resolution they gave notice to the House of Commons.

Whereupon the following points were resolved by the whole body of the House of Commons :

1. That the first writ was duly executed, and the election good, and the second election absolutely void.

2. That

2. That it was a most perilous precedent, that after two Knights of a county were duly elected, any new writ should issue for a second election, *without order of the House of Commons itself.*

3. That the discussing and ADJUDGING *this*, and the *like differences*, ONLY, belonged to the said House.

4. That though the Lord Chancellor and Judges were competent judges in their proper courts, yet *they were not* in parliament.

5. That it should be entered in the very Journal Book of the House, that the first election was approved to be good, and that the Knights then chosen had been *received and ALLOWED as members* of the House, *not out of any respect the said House had, or gave to the resolution of the Lord Chancellor and Judges therein passed, but merely by reason of the resolution of the House itself*, by which the said election had been approved.

6. That there should be no message sent to the Lord Chancellor, not so much as to know what he had done therein, *because it was conceived to be a matter derogatory to the power and privilege of the said House.*

Thus we find that the House of Commons, even in these early days, were so justly jealous of their jurisdiction in these respects, that they resolutely and explicitly asserted their *sole right of adjudging this and the like differences*: And though they concurred with the Chancellor and the Judges, in their decision on the merits of this case, yet they were scrupulously careful to have it entered upon record, that they received and *allowed* the Knights as members, not out of any regard to the resolution of the Chancellor and the Judges, but solely from their *own resolution.*

The firm and spirited conduct which the House of Commons displayed on this occasion, is the more remarkable, as, during that reign, the dignity and privileges of that House, were not always regarded with due consideration.

Another attempt was made on the jurisdiction of the Commons in *Goodwin's case*, 1 James 1, printed in the Journals of the House, and the 7th vol. of State Trials. This case was reprinted in the year 1704, by order of the House of Commons, on occasion of the famous debate on the *Ailesbury* election; which will be taken notice of in its order. The case of *Goodwin* was as follows:

Sir Francis Goodwin was elected Knight of the Shire of the county of Bucks; but the return of his election being made, it was refused by the
Clerk

Clerk of the Crown : And the return of Sir John Fortescue, who had been elected upon a second writ, was entered. Whereupon the question was put, after long debate,—"Whether Sir Francis Goodwin were lawfully elected and returned? which was resolved in the affirmative."

Three days after, the Lords sent a message to the Commons, that there might be a conference about Goodwin's election : To which the Commons answered, "That they did conceive it did not stand in *Honour and Order* of the House, to give account of any of their proceedings and doings."

The Lords replied, that the King having been acquainted with what had passed in Goodwin's case, thought himself engaged in honour to have the affair debated again, and had ordered them to confer with the Commons upon it. Whereupon the Commons, by their Speaker, gave their reasons to the King, why they could not admit of this innovation. But all they could obtain was, that, instead of a conference with the Lords, the King commanded them to confer with the Judges.

This mandate, to which the House were extremely averse, produced very warm debates. One member, with becoming spirit, observed, "That by this course the free election of the country was taken away, and none would be chosen but such as pleased the King and Council. Let us therefore," says he, "with fortitude, understanding and sincerity, seek to maintain our *privilege*; which cannot be construed any contempt in us, but *merely a maintainance of our COMMON RIGHT*, which our ancestors have left us, and it is just and fit for us to transmit to our posterity."

Another member said, boldly, "This may be called a *quo warranto* to seize our Liberties.---Our hands were never sought to be closed before. It opens a gap to thrust us all into the petty bag. A Chancellor may call a parliament of what persons he will by this course. Any suggestion may be cause of sending a new writ. Judges cannot take notice of private customs or privileges: *But we have a privilege which stands with the law.*"

At length, the question being put, Whether they should confer with the Judges? It was carried in the negative, by a general voice; *No conference.*

In the end, a committee was appointed to prepare answers in writing, to the four objections which the King had made to the reasons urged by the Speaker. As the third and fourth objections do not apply to the present purpose, it will be sufficient to take notice of the first two.

Objection 1. " That we asſume to ourſelves power of examining of the elections and returns of Knights and Burgeſſes, which belougeth to your Maſteſty's Chancery, and not to us: For, that all returns of writs were examinable in the courts wherein they were returnable; and the parliament writs being returnable into *Chancery*, the returns of them muſt needs be there examined, and not with us."

Our humble answer is, that until the 7th year of King Henry the 4th, all parliament writs were returnable into parliament, as appeareth by many precedents of record, and conſequently the returns there examinable.

Although the form of the writ be ſomewhat altered by this ſtatute, yet *the power of the parliament to examine and DETERMINE of elections* remaineth; for ſo the ſtatute hath been always expounded ever ſithence, by uſe to this day: And for that purpoſe, both the Clerk of the Crown hath always uſed to attend all the parliament time, upon the Commons Houſe, with the writs and returns: And alſo, the Commons, in the beginning of every parliament, have ever uſed to appoint ſpecial committees, all the parliament time, for examining controverſies concerning elections and returns of Knights and Burgeſſes; during which time the writs and indentures remain with the Clerk of the Crown; and after the parliament ended, and not before, are delivered to the Clerk of the petty bag in chancery, to be kept there; which is warranted by *reaſon*, and *precedents*. By *reaſon*; for, that it is fit that the *return ſhould be in that place examined, where the appearance and ſervice of the writ is appointed*: By *precedents*; of which they cited many, too tedious to be here enumerated, and then conclude, that,—
 " Uſe, reaſon and precedents do concur to prove, the *Chancery* to be a place
 " appointed to receive the returns, as to keep them for the parliament, but
 " not to judge of them: And the inconvenience might be great, if the
 " *Chancery* might, upon ſuggeſtion, or Sheriff's returns, ſend writs for
 " new elections, and thoſe *not ſubject to examination in parliament*: For, ſo,
 " when ſit men were choſen by the counties and boroughs, *the Lord Chan-*
 " *cellor, or the Sheriffs, might diſplace them, and ſend out new writs, until*
 " *ſome were choſen to their liking.*"

Objection 2. That we dealt in the cauſe with too much precipitation, not ſeemly for a council of gravity, and without reſpect to your moſt excellent Maſteſty, who had deſired the writ to be made: And, being but half a body, and no court of record alone, reſuſed conference with the Lords, the other half, notwithstanding they prayed it of us.

Our humble answer is, to the precipitation, That we entered into this cauſe, as in other parliaments of like caſes hath been accuſtomed; calling to us the Clerk of the Crown, and viewing both the writs, and both the
 returns;

returns, which hath been warranted by continual usage among us.

Concerning our refusing conference with the Lords, there was none desired, until after our sentence passed; and then we thought, That, *in a matter private to our own House*, which, by rules of order, might not be by us revoked, we might, without any imputation, refuse to confer. Yet, understanding, by their Lordships, that your Majesty had been informed against us, we made haste to lay open, to your Majesty, the whole manner of our proceeding; *not doubting, though we were but part of a body, as to MAKE NEW LAWS, yet, for any matter of privileges of our House, we ARE, AND EVER HAVE BEEN, A COURT OF OURSELVES, of sufficient power, "to discern and DETERMINE, without their Lordships, as their Lordships have used always to do for theirs, without us."*

In return to this, the King replied, that he had seen and considered of the manner and the matter: He had heard his *judges* and his *council*; and that he was now *distracted in judgment*. Therefore, for his farther satisfaction, he desired, and commanded, *as an absolute King*, that there might be a conference between the House and the Judges.

This unexpected message occasioned great amazement in the House, but, at length, it was proposed to petition the King, that he would be pleased to be present at the conference himself. This disputatious Monarch gladly accepted the proposal, and said that he would be president himself.

At this conference, the King acknowledged, that the *House of Commons* was a court of record, and a judge of returns. At length this conference produced a kind of compromise. It was agreed, that both the members should be excluded, and that a new writ should issue; to which the Commons with difficulty consented, at *Goodwin's own particular desire*, expressed in a letter from him to the *Speaker*, which was read before the question was put, and wherein he pressed the House to consent to the proposition, chusing rather to wave his right than be the occasion of a quarrel between the King and the Commons.

Nevertheless, many members were greatly dissatisfied, even with this concession. It was said by one,—“ We lose more at a parliament, than we gain by a battle. The authority of the Committee was only to fortify what was agreed on by the House for answer, and they had no authority to consent.”

It was further urged by another, in these terms;—“ We should proceed to take away our dissention, and preserve our liberties: We have exceeded our commission, and drawn upon ourselves a note of inconstancy and levity.”

Thus we see, that, even in these spiritless days, when the Sovereign exerted himself in the highest tone of prerogative, the Commons boldly asserted their right of jurisdiction; and the King perceived, by the temper and arguments of the House, that he had no prospect of becoming, as he intended, master of elections.

Rapin very justly represents this attempt of the King's, as an evidence of his aiming at absolute power: And it may be added, that had he succeeded to his wish in this attempt, it would have enabled him to assume that *absolute* power in *fact*, which he arrogated in *words*.

No vestige, from this time, I believe, appears, where the exclusive jurisdiction of the House of Commons, with respect to elections and matters incidental thereto, came in question, till just before the restoration, in the case of *Nevil* against *Stroud* †; which was an action on the case brought in the Common Pleas, against the defendant, as Sheriff of *Berkshire*, for a false return. The record was delivered into parliament, and was afterwards, by order of parliament, adjourned into the Exchequer Chamber ‡, but was never determined. It was nevertheless strongly urged in this case, “*That as it concerned parliamentary privilege, the Common Law could not inter-meddle with it.*”

I rather mention this, because the Courts of Law adopted this opinion in cases I shall hereafter take notice of.

In the year 1672, the Commons were again under the necessity of asserting their jurisdiction. When the Earl of *Shaftsbury* was Lord Chancellor, writs issued, during a prorogation of parliament, for electing members in the room of those that were dead: The King himself was so cautious, as to the regulating of this proceeding, and had so much regard to the privileges of the House of Commons, that, at the next session of parliament, 5th of February 1672, he spoke to the House of Commons from the throne in these words:

“ One thing I forgot to mention, which happened during this prorogation; I did give orders for the issuing some writs, for the election of members, instead of those that are dead; that the House might be full at their meeting: And I am mistaken, if this be not according to former precedents. But I desire you will not fall to other business, till you have examined that particular; and, I doubt not, but precedents will justify

† 2 Sid. 168.

‡ It was usual, about this time, for committees of the House of Commons to meet in the Exchequer chamber.

“ what is done: I am as careful of all your privileges as of my own prerogative.”

The 6th of February 1672, the House of Commons took the matter into consideration; and several precedents being cited, and the matter at large debated, and the general sense and opinion of the House being, that, during the continuance of the High Court of Parliament, the right and power of issuing writs for electing members to serve in this House, in such places as are vacant, is in this House, who are the proper judges also of elections and returns of their members.

Thereupon it was *Resolved*, “ That all elections, upon the writs issued since the last session, are void: And that Mr. Speaker do issue his warrant to the Clerk of the Crown, to make out new writs for those places.” Which was done accordingly.

Not many years after, that is, in the 26 Car. 2. an attempt was made to encroach on the exclusive privilege of the House in matters of election, by endeavouring to establish a concurrent jurisdiction, in the case of *Barnardiston* against *Soame* *.

This was an action on the case brought in the *King's Bench*, against the defendant, as Sheriff of Suffolk, for a double return. The election of the plaintiff had, upon examination in parliament, been judged good, and they had committed the defendant for making this double return. Nevertheless, the jury found a verdict for the plaintiff, with 800*l.* damages.

It was moved however in arrest of judgment, that the action did not lie; and, among other reasons, it was urged, “ *That the falsity or verity of the return was only examinable in the House of Commons, who are the SOLE JUDGES, and will punish such falsities, as they have done in the present case.*”

Judgment however was given for the plaintiff.

Lord Chief Justice *Hale*, in this case, bid all persons about him take notice, that, *they did not determine the right of election, for the JUDGMENT in that case belonged to Parliament*; but, he said, *since the House of Commons have determined the right, he thought they might follow their judgment, to repair the plaintiff in damages.*

This judgment, nevertheless, was afterwards reversed in the Exchequer Chamber, by the opinion of Chief Justice *North*, and five other judges, against two; the Chief, with the five other judges, holding, that the action

* 2 Lev. 114. Pollex 470. 3 Keb. 365, 369, 389, 664: 7 St. Tr. 428.

did not lie: And this judgment of reversal was afterwards affirmed in the House of Lords *.

After such a solemn reversal of the judgment of the King's Bench, and an affirmative of that reversal in the House of Lords, it might have been expected that this point would never be moved again. Yet in the 33 Car. 2. it came again in dispute in the case of *Onslow* against *Rapley* †; which was an action on the case brought against the defendant as returning officer, for a double return, and a verdict thereupon for the plaintiff. But, upon motion in arrest of judgment, it was held clearly by the whole court, that the action did not lie. They were unanimous *that they had no jurisdiction of this matter*; and went so far as to say, "That it would be great presumption in the court to meddle with elections to Parliament, before the matter hath been determined in Parliament."

Sometime after the resolution, in the 12th Wm. 3^d, a farther attempt was made, in a case somewhat different from the last, to give the courts of law a concurrent jurisdiction with the House of Commons.

This was in an action on the case brought in the *Common Pleas*, by *Prideaux* against *Morrice* §, for a *false* return, before a determination in Parliament, and the court were clearly of opinion that such an action did not lie.

In this case, Chief Justice Trevor delivered the opinion of the court in the following words:

"That this action would not lie before the election was determined in Parliament, *which was the proper court to determine this matter*. If it should lie, this inconvenience might follow, viz. The verdict might find contrary to what the Parliament might hereafter determine, which is not to be allowed; for it is plain that, *if the Parliament had determined against the plaintiff, he could never afterwards have this action*."

"It is true, in courts which have concurrent jurisdictions, there cannot be different judgments in one and the same case; because the determination must be in that court, which was first possessed of the cause, for if an action is brought for the same matter in one court, the party may plead in the abatement, that it is depending in another; and if judgment is given in the first action, then he may plead it in bar to the last."

* 1 Lutw. 89.

† 3 Lev. 29. 2 Vent. 37.

§ I take no notice of the case of *Norris* against *Mawdit*, as that was an action for a false return, grounded on the stat. 23 A. 6. c. 15. and does not apply to the question under consideration. See 5 Mod. 511. Comb. 430.

§ 1 Lutw. 82. Nelf. Lutw. 31. Salk. 502. Holt 523. 8 St. Tr. 9.

But, in this case, there may be different judgments, BECAUSE THE COURT OF PARLIAMENT HAVE A SUPERIOR JURISDICTION IN THIS MATTER *.

A writ of error was brought upon this judgment in the Court of *King's Bench*, and the judgment was there affirmed.

Nevertheless, such is the contentious spirit which has at all times attended elections, and such the animosity with which each party opposes the other, that the exclusive right of jurisdiction of the Commons, in these matters, did not long remain uncontraverted, but came again in question, in the famous case of *Ashby against White*, and others †, in the 2d Ann.

This was an action upon the case brought against the defendants, as constables of *Ailesbury*, for refusing to receive his vote in the election of two burgesses for that borough. A verdict was found for the plaintiff, and it was afterwards moved in arrest of judgment, that the action was not maintainable; and it was held, by the opinion of three judges, against *Holt* Chief Justice, that the action did not lie.

In the end, however, this judgment was reversed, upon an appeal to the House of Lords; and judgment was given for the plaintiff.

But the Commons warmly resented this attempt to destroy their independence ‡, and such violent disputes arose between the two Houses, that it was judged proper to put an end to them by proroguing the Parliament.

The highest reverence, no doubt, is due to the judgment of that supreme court of judicature, the House of Lords; but an insatiate appetite for power is natural to all bodies of men; and if the judgment of that august assembly may be presumed to have less authority in one case than another, it must certainly have the least weight in this, wherein their judgment directly tended to enlarge their own jurisdiction, and ultimately to give them a manifest ascendancy over the third estate in the kingdom, and consequently over the Liberties of the people of Great Britain.

It must be premised likewise, that great deference is undoubtedly due to the opinion of that eminent Chief Justice, Lord *Holt*; at the same time it must be acknowledged, that the three judges, from whom he differed, have ever been reputed among the most learned and able of the profession: And perhaps some

* The report of this case in the French edition of *Lutw.* 89. is to the same effect: But the Chief Justice is there made to say further, "*That the House are the proper judges.*"

† *Salk.* 19. 3 *Salk.* 17. 6 *Mod.* 45. *Holt* 524. 8 *St. Tr.* 89.

‡ They voted it a breach of the privilege, and committed all the parties concerned, lawyers, &c.

of the arguments § of this great man, on this occasion, will be found to depend on those hair-breadth distinctions, which, however they may shew the subtlety of argumentation, do not always tend to the establishment of truth.

It is to be premised, that it was agreed in this case that the burgesses, for whom the plaintiff tendered his vote, were elected. Nevertheless Lord Holt, in giving his opinion, said, That it was not material whether the candidate, for whom he would have voted, be chosen or not.

In this, however, he seems to lose sight of the substantial merits of the question. For what is the *end* for which the *right in question* was established? No other than this: That certain persons, *being duly qualified*, should have the privilege of electing whom they please, *being duly qualified likewise* to represent them in the great council of the nation.

If therefore the person for whom they tendered their vote be received, the substantial *end*, for which the privilege was granted, is obtained; so that they cannot alledge any injury; and though their votes may have been rejected, yet they are not thereby deprived of their *right*. They may tender their votes on any other occasion, and there can be no danger, that, by the rejection of their votes by the returning officer at one time, any person, not of their choice, should, at any subsequent election, be chosen their representative: for it is at all times open to them to assert their right by petition to the House of Commons, where, if well founded, it will be allowed and confirmed; and their votes, if necessary to give a majority to the candidate of their choice, will be added to the poll.

But, says Lord Holt, “by refusing the plaintiff’s vote, he has an injury done him, for which he ought to have a remedy: Want of right and want of remedy are reciprocal. Wherever there is injury, it imports a damage. The Parliament cannot judge of this injury, or give damages to the plaintiff.

That the House of Commons cannot give damages, *eo nomine*, as damages, may be admitted; but does it therefore follow, that they cannot judge of the injury, and give a remedy?

His Lordship very properly flights the notion, that there can be no *damage* but a pecuniary one. But is it not equally exceptionable, to contend, that there can be no other kind of *remedy* but a pecuniary one?

§ In truth, the most material arguments urged by Lord *Holt*, in this case, were strongly pressed before by Sir Robert *Atkins*, and over-ruled in the case of *Barnardiston* against *Soames*. See 7 St. T. S. 434 & sequent.

Undoubtedly

Undoubtedly there may; and the *remedy* is, to petition the House of Commons, who will examine and determine the matter of *right*, and thereby judge of the *injury*, and punish the offender.

No, says his Lordship; there can be no petition in this case. “ Was ever such a petition heard of in parliament, as that a man was hindered of giving his vote, and praying them to give him a remedy ? ”

To this it may be answered, That, as his Lordship very properly observed, in this case, that it was no objection to the bringing the action, that no such action was ever brought before, so it might have been urged, that it could be no objection against the preferring of such a petition, had no such petition ever been preferred before.

As the House of Commons, only, have competent jurisdiction, with respect to the rights of election, so every invasion of those rights must, at all times, have been cognizable before them: It was urged, as to this point, by a member, in the course of the debate in the House of Commons, that he had known petitions touching elections preferred by very few persons; by the same rule, said he, a petition may be presented by *one*: And in truth it appears from the Journals of the House of Commons, of the 31st of May 1628, that this doctrine was expressly laid down.

At that time, there was a question with respect to *Warwick*, whether the election should be made by the Mayor and Common Council, or by the Commoners in general. And a petition was produced, whereby above 200 Commoners disclaimed to have any right of Election. But the petition was refused, and the reason alledged, was, “ because, if *one* Commoner appear to sue for his right, we will hear him.”

And in truth several petitions have, of later years, been presented, merely to ascertain the right of voting, where there was no question about the merits of the election.

In the year 1711, which was soon after the case of *Ashby* against *White*, a petition was presented by *William Treene* and others, of the city of *Coven-*
try, complaining of their being debarred of their undoubted right of voting, and praying that their right of voting may be ascertained to them, and *repa-*
ration made for the *injury* they have sustained in being denied the same.

They were heard by their council, and their right was established.

Again, in 1723, a petition was preferred by *Charles Webb*, and others, of the borough of *Calne* in *Wilts*, complaining that their votes were refused at the last election.

They were heard by their council, who *admitted that the sitting members were duly elected, and justly returned*: so that the merits of election, it is seen, were not in contest, but the right of voting in the petitioners was, as an abstract proposition, the only question before the House. In the end, their right was disallowed.

In 1724, another petition was presented from the inhabitants and house-keepers of the borough of *Honiton*, in the county of *Devon*, stating that they had and enjoyed an undoubted right of voting, till 1711, when the House determined the right of election to be in the inhabitants paying scot and lot only: That the returning officers, since that time, had refused their votes: That the petitioners would have voted for the then sitting member, *had there been any poll*, and did desire to sign the return, but were refused as formerly: and prayed relief; which was granted them, by establishing their right.

From these instances, it appears that petitions have been preferred to Parliament, merely to substantiate the right of voting in the elector, as an abstract question, where there was no dispute whatever about the right of the elected, where there was no contest about the election, or the return, and, in the last instance above stated, *where there was no poll even*.

There is no room therefore for Lord *Holt's* apprehensions, that there may be a right without a remedy: as the right concerns the Parliament, so the remedy is to be had there only. They only can give the *specific thing* withheld: For should a court of law recognize the right of voting, yet they cannot add the voter's name to the poll. The House only can restore him to the *specific right* which has been refused.

It is too much to say that every injury imports damage. There are many cases where the law only gives the specific thing contended for, without damages, as in cases of *mandamus*, &c. Nay the common law paid so little attention to damages, that, in several instances, damages were not recoverable upon real actions; and costs were not recoverable in any cases whatever at common law.

Besides his Lordship takes for granted the very thing in dispute, when he says, that by refusing the plaintiff's vote, he has an injury done him. For the *refusal* can be no injury, unless the *right* of voting be first established; and that, as has been shewn, the verdict of a jury cannot do. The House of Commons only, are the competent judges of the rights of election, and the legality of votes. Their jurisdiction in these cases is part of the law of the land, which has been recognized by several acts of Parliament*, de-

* 7 & 8 W. 3. c. 7. 2 Geo. 2. c. 24.

declaring that "*such votes shall be deemed to be legal which have been so declared by the last determination* IN THE HOUSE OF COMMONS, *which last determination shall be final.*"

Perhaps, indeed, after the right of voting has been determined in the House of Commons, an action at law may, as was hinted by the other judges, be maintainable for the recovery of the costs, incurred in the prosecution of the right. But to contend that an action lies before such determination, is to introduce the inconvenience which Lord *Trevor* so strongly insisted upon. For should an action be brought against a returning officer for refusing an elector's vote, this would not stop the proceedings of the House of Commons upon a petition: And should a verdict be found by a jury, with damages against the returning officer for the refusal, and judgment be given thereon, the House might afterwards determine on the petition, that he had no right of voting, and might punish the officer for admitting his vote. So that on one hand, he might be punished by the court of law for refusing the defendant's vote; and he might be punished on the other hand, by the House of Commons, for admitting it: which would be such a gross absurdity, and such a scandal to justice, as the laws of no country can be supposed to countenance, and which the laws of this country do not countenance; for, by the ancient Law of the Land, recognizable by act of Parliament, rights of this nature can only be determined in the House of Commons.

A farther attempt to give the courts of law a concurrent jurisdiction with the House of Commons, with respect to elections, was made in the case of *Kendal* against *John*† the 5th Ann.

This was an action in the case against the defendant for a false return: and after a verdict for the plaintiff, it was moved in arrest of judgment, that the action did not lie; and the judgment was arrested, by the unanimous opinion of the court, who held that no action would lie.

In this case, among other arguments, it was urged, that the right in question was a *parliamentary right*; That the *remedy* therefore *must be parliamentary*, and could be had no where else but in Parliament.

It was said farther that THE COURT WOULD JUDICIALLY TAKE NOTICE OF THE LAW OF PARLIAMENT; that IT WAS THE LAW OF THE LAND; and, according to Lord *Coke*, OUGHT TO HAVE PRECEDENCY.

† Holt 629, &c. Fortesc. 104: And see the S. C. by the name of *Coundell* against *John*, Salk. 504.

Another reason assigned why there was no cause of action was, *That the plaintiff had had the EFFECT of his election*; that he was returned, and had his place; there was nothing remaining wherein he could pretend himself injured, but the costs he had been at in the prosecution, and as to them it ought to be supposed *that the House considered them*.

In short, Lord Chief Justice *Holt* himself, in delivering his opinion, said,—
 “ The proper remedy is in the House of Commons; and we cannot meddle
 “ with it; but they can cause returns to be altered, and then they become the
 “ same as if the person was originally returned.”

Thus it appears, from the foregoing historical deduction, that every attempt which has been made to encroach on the exclusive jurisdiction of the House of Commons, in matters of election, either with respect to electors or elected, has either dropped of itself, or been resolutely withstood and repelled by the House of Commons; who have constantly, as they did in the case of *Goodwin*, asserted and maintained this jurisdiction, as their COMMON RIGHT, which they derived from their ancestors.

As to their right of deciding with respect to the qualifications of the *electeds*, that has not, in any of the cases, been disputed. Even Sir Robert *Atkins*, who, in the case of *Barnardiston* against *Soame*, contended most strenuously for affirming the judgment, said, “ *We know that the House of*
 “ *Commons is now possessed of the jurisdiction of determining all questions concern-*
 “ *ing the election of their own members, so far at least, as in order to their*
 “ *being admitted or excluded from sitting there.*”

Nay, in the case of *Asbby* against *White*, neither Lord *Holt*, nor any of the zealous Whigs of those days, ventured to dispute that the jurisdiction of the House was fully competent, *as to the seats of their own members*. One of the Lords, at a conference, said, “ We do not meddle with the Commons
 “ right to determine their own elections; they have a settled possession of it,
 “ which is a right.” So that the case of *Asbby* against *White*, though cited on the other side, concludes strongly against the doctrine they labour to introduce.

Nevertheless they contend, that the right of being elected is a *common law* right, of which no man can be deprived, but by act of Parliament.

This, in the first place, is assuming a proposition for granted, which may safely be denied. The right, as was said, in the cases above cited, is a *parliamentary right*, to be exercised only in Parliament, and therefore cognizable there only, where the duty is to be executed.

Besides,

Besides, none can say that, in the present instance, Mr. *Wilkes's* right of being elected is taken away; for in truth it is only *suspended* during the existence of this parliament. When the body which expelled him is dissolved, his capacity of being elected revives. The incapacity is not perpetual, but only temporary. To make it perpetual, is what, in the better opinion perhaps, an act of Parliament only can do. But the House of themselves can disqualify any member during that Parliament. For let the right be a common law right, or a parliamentary right, yet, like other rights, it may be forfeited by crimes and misdemeanours, &c. And who should judge of those causes of forfeitures, but the body of which he is a member?

Indeed, the right of jurisdiction in the House of Commons, in this respect, is so fully established by immemorial usage, that it cannot be disputed, without contraverting the fundamental principles on which the Law of the Land depends. The House, as appears from their Journals, have determined with respect to the qualifications of the *elected*, from time to time, down from the year 1553, to the present period: and it is by their *resolutions* only, that persons of various classes are at this day disqualified. It is by their resolutions, that—

1. *Clergymen* are not eligible.

The 12th October 1553, a committee was appointed to enquire about the right of *Alexander Newell* and *John Foster* to sit in the House: and the committee reported that Alexander Newell being Prebendary of Westminster, and thereby having a voice in the Convocation House, cannot be a member of this House: which was agreed by the House, and a writ was directed for another burgess in his place.

We find the like resolutions the 8th February 1620, and the 17th January 1661, with respect to other clergymen.

2. Judges are not eligible.

“ The 28th June 1604, it was moved by Sir Edward Hobbes, as a doubt to be resolved, Whether if a member of this House be called to the place of a *Judge*, or other *attendance above*, during the time of Parliament, he ought to sit here during the same Parliament.”—We do not find any resolution on this point, at that time. But on

The 9th November 1605, the committee having reported two members to be attendants as *Judges*, in the higher House, the question was put on the

report, Whether they should be recalled; and the House *resolved*, That they should *not*.

Accordingly we meet with several passages in the Journals, particularly the 11th April 1614, where the exclusion of the Judges is spoken of as an established practice; and we see, by daily experience, that whenever any members of the House of Commons are appointed Judges, new writs are issued for the election of others in their room; of which the numerous precedents are so notorious and recent, that it is needless to refer to them.

3. *Returning Officers* are not eligible.

The 25th June 1604, upon a motion of Mr. *Moore*, to know the opinion of the House, whether the Mayor of a town, &c. might lawfully be returned, and serve as a member?

The House *resolved* and ordered, and the clerk of the House was commanded to enter it accordingly, that from and after the end of this present Parliament, no Mayor of any city, borough, or town corporate, should be elected; returned, or allowed to serve as a member of this House, and if it did appear that any member was returned a burges, that presently a new writ should be awarded, for the choice of another in the room and place of the said Mayor.

The 14th April 1614, upon a report of the committee, that Mr. *Berry*, bailiff of Ludlow, had returned himself.

The House *resolved*, That he should be removed, and a new choice made:—And, *Resolved* farther, That all Mayors, and Bailiffs, in the like case, should be removed.

Accordingly, 22d May 1621-2, we find, that a Mayor being returned, he was removed, and a new writ ordered. And, on

The 2d June 1685, The House resolved, That no Mayor, Bailiff, or other Officer of a Borough, who is the proper officer to whom the precept ought to be directed, is capable of being elected to serve in Parliament for the same borough of which he is Mayor, Bailiff, or Officer, at the time of the election.

4. *Aliens* are not eligible.

The 28th May 1624, *resolved*, upon the question, That the election of Mr. *Walter Stewart*, being no natural born subject, is void: and a warrant to go for a new writ for Monmouth.

5. The eldest sons of Scotch Peers are not eligible.

The 3d December 1708, A motion being made, and the question put,
 “ That the eldest sons of the Peers of *Scotland* were capable, by the laws of
 “ *Scotland* at the time of the Union, to elect or be elected as commissioners
 “ for shires or boroughs to the Parliament of *Scotland*; and therefore, by the
 “ Treaty of Union, are capable to elect or be elected to represent any shire
 “ or borough in *Scotland*, to sit in the House of Commons in *Great Britain* ;”
 It passed in the *negative*.——

Accordingly, The 6th December 1708, a new writ was ordered in the room
 of Lord *Haddo*, who, being the eldest son of a Peer of that part of Great Britain
 called *Scotland*, was declared incapable to sit in the House. And,

The 18th November 1755, a new writ was ordered in the room of *Charles*
Douglas, Esq; commonly called Lord Douglas, then become the eldest son of
 a peer of that part of Great Britain called *Scotland*.

Besides these, which are permanent disqualifications of particular classes,
 the House have, in various other instances, determined and adjudged with re-
 spect to the qualifications of the elected. They have adjudged persons in
execution not to be eligible.

The 24th March 1625, it appearing to the House, that Sir *Thomas Moncke*
 was in execution before, and at the time of, his election, a writ was ordered
 to issue for a new choice in his room.

The 22d March 1661, at the election for Leinster, the poll was denied to
 Mr. *Coningsby*, who was put in nomination for that borough : but he being a
 prisoner in execution for debt *, and not eligible, it was adjudged, which is
 very observable, that the denying the poll to him did not avoid the election;
 and Mr. *Cornwall* and Mr. *Graham*, the other candidates, were duly elected.

The 15th December 1689, on proof of bribery in the election for *Stock-*
bridge, the House resolved, that it was a void election : And resolved farther,

“ That William Montague, Esq; be disabled from being elected a burges
 “ to serve, in this present Parliament, for the borough of *Stockbridge*.”

The 10th November 1707, resolved, That every person who by an act of
 the first session of the last Parliament, intituled, “ An Act for the better secu-
 “ rity of his Majesty’s person and government, and of the succession of the
 “ crown of England in the Protestant Line,” is disabled, from and after the
 dissolution or determination of the said Parliament, to sit or vote as a member
 of the House of Commons in any parliament to be thereafter holden, is, by
 virtue of the said act, incapable of sitting or voting, as a member of the House
 of Commons in this present parliament.

* The reason why a person in *execution* is not eligible, is obvious, because, such an one is not
 bailable; consequently he cannot attend to discharge the duty of a representative : Whereas a
 person arrested on mesne process is admissible to bail.

The 7th December 1708, *resolved*, That *Anthony Hammond*, Esq; being a commissioner in the navy, and employed in the out-ports, is thereby *incapable of being elected*, or voting as a member of this House.

The 9th June 1733, *resolved*, That the accepting a commission of Governor or Lieutenant-governor of any fort, citadel, or garrison, upon the military establishment of his Majesty's guards and garrisons of Great Britain, by any member of the House, being an officer in the army, does *not* vacate the seat of such member.

Thus, even where the disqualification is by statute, the House is the only court where the statute can receive an exposition, or where any adjudication can be made.

But the following instance is of itself sufficient to prove, that the House are, and have been acknowledged to be, the proper and only judges concerning the qualifications of the elected. On

The 19th November 1606, not many years after the case of Goodwin, the Speaker produced a note sent unto him, as he said, by commandment of the Lord Chancellor, containing the names of certain members of the House, disposed and employed by his Majesty since the last session in special services, with direction TO KNOW THE PLEASURE OF THE HOUSE, *whether the same members to be continued*, or their places supplied with others.

In this list are the names of Sir Thomas Ridgway, Treasurer of War, and Sir Humphrey Winch, Chief Baron of Ireland, with others. And,

The 22d November 1606, upon the report, warrants were ordered for the choice of new members in the places of Sir *Thomas Ridgway*, *Humphrey Winch*, &c.

Thus it appears from the foregoing precedents, that the House have of antient time exercised the sole right of determining the qualifications of the elected: And that this right has been recognized in one of the most arbitrary reigns, by *referring to their pleasure*, to determine, whether certain members should continue, or their places be supplied by others.

It appears likewise, that they have exercised the right of adjudging and declaring the incapacity of being elected, not only as expositors of the written or Statute Law, but even *where the law has been silent*, they have adjudged persons incapable of being elected, from the particular circumstances of the case, and upon general principles of constitutional policy.

Thus, it has been shewn, that from immemorial usage, recognized and confirmed by the Statute Law of the realm, the House of Commons have the

sole right of judicature, in all matters respecting elections; and indeed, it is clear, upon the general principles of reason and the spirit of constitutional policy, that such a power ought to be vested in them, and them only, as essential to the security of publick liberty.

The constitution of the British government, being of a mixed nature, the House of Commons are the body, whose peculiar duty it is, to vindicate the liberties of the people, against the encroachments either of the Sovereign or of the Nobles.

The better to secure the popular interest, the Commons are elective; and certain people, being qualified as the law directs, have, at stated times, the privilege of electing whom they please, *being likewise qualified by law*, to act as their representatives in parliament.

If any doubt or dispute arises, in respect to the qualification either of the electors or the elected, who does the constitution point out as the proper judges to decide in such cases? Most certainly, that body only, who are constituted as the representatives of the people, ought to determine, upon points which are so essential to the preservation of their liberties.

None will be extravagant enough to suppose, that the people at large, can exercise a judicial power of determining the law, with respect to their own qualifications, or the qualifications of their representatives: When the electors of a particular county or borough have made their election, they have executed their power; and should any doubt arise, either with respect to their qualifications, or the qualifications of the elected, they then are parties interested in the question, and consequently cannot be judges. The question is then between them and the rest of the people; for every member, as has been said, though chosen for a particular place, serves for the whole nation.

Nothing therefore can be more absurd, than to suppose that they should be judges in their own cause, and that their determination, in a matter wherein they are interested, and may therefore be presumed partial, should bind the whole community.

It would be as absurd to contend, that any of the courts of Westminster, or any other judicature whatever, should be allowed to take cognizance of matters respecting the qualifications of electors or elected.

Should any other court be admitted to a concurrent right of judicature in such cases, it would necessarily introduce a clashing of jurisdiction, and a contrariety of judgment.

Besides, as it has been shewn, that the electors of the particular county
or

or borough, whose rights are in question, cannot judge of the matter in dispute, it would be highly ridiculous to imagine, that any 12 men of those electors, should have a power of determining in such case.

To contend for such a power in the courts of Westminster, is not only absurd, but it is highly dangerous. For——

As an appeal lies ultimately from the judgments of all the courts at Westminster, to the House of Lords, the *Lords would become the ultimate judges with respect to the qualifications of electors and elected*, which would apparently give them such an *ascendancy* over the Commons, as would ruin their independence, overthrow the balance which it has been the provident care of our forefathers to establish, and, in the end, destroy the rights and liberties of the people.

As this power cannot, nor ought to be lodged in any of the courts at Westminster, so neither can it be in the King and Council, or any where else, without being attended with the same inconveniences and dangers: It can therefore only reside in the general body of the people, by their representatives; that is, in the House of Commons: Which is, and by the constitution can only be, the general court of the people.

The fatal effects of placing such a Power elsewhere, are obvious and certain. Therefore, no man, who is not an enemy to the constitution, would wish to see any other judicature interfere with that of the House of Commons. On the jurisdiction of that House, the liberties of this country depend. Our wise and spirited ancestors, in their Address to *James* the 1st, declared, that “The privileges, liberties and *jurisdiction* of Parliament, “were the right and inheritance of the subject*.”

As it has been shewn, that the House have, and ought to have, the sole jurisdiction over their own members, *as such*, that they may punish them by expulsion, &c. That they may declare and *adjudge*, who are, and who are not, capable of sitting in that House.—It will appear, 3dly, That they have exercised this right, with respect to the late election for Middlesex, in a legal and constitutional manner, not only strictly agreeable to the Law and usage of Parliament, but conformable to the proceedings of the Courts of Justice in Westminster Hall, on similar occasions.

It has been already stated, by extracts from the votes, that, upon Mr. Wilkes's being returned after his expulsion, the House *resolved*, That he *was*, and *is*, *incapable of being elected* to serve in this present parliament.

Therefore, admitting that his incapacity was not a *necessary consequence* of

* See Rush. col. 53.

his expulsion, which the Freeholders were bound to take notice of, yet this *express* declaration of incapacity was such as *all the Freeholders of Great Britain* were bound to take notice of. For this, which is but an exposition of their former resolutions, is the solemn adjudication of a *court of judicature*, on a subject wherein they have not only a competent, but the *sole jurisdiction*. It is therefore as binding, nay, being without appeal, it is, in its effect, more obligatory than a judgment of any of the courts of Westminster, to which every subject is bound to submit.

Now, it is a known and established maxim, that every man is bound to take notice of the law. With what colour then can it be pretended, that the Freeholders of Middlesex had no notice of Mr. Wilkes's incapacity? Ignorance of the fact may, in some cases, be pleaded in excuse, but ignorance of the law never can.

In truth, however, it is notorious, that they were neither ignorant of the law, nor of the fact. The incapacity of the person they thought proper to elect, was, with scrupulous caution, set forth in the introductory part of the writ, which is always read publicly, previous to the election. Yet, even this caution, which takes away all pretence of want of notice to the Freeholders, has been made the foundation of another objection.

It has been objected, on the authority of Lord *Coke*, that the writ can receive no alteration, but by an act of Parliament. No one will dispute this authority. But the clear answer to this objection is, that the writ, in reality, was not altered. The body, or directory part of the writ, did not vary a jota from the established form; but the introduction, which declares the cause of vacancy, must, in the nature of things, be varied according to the different causes which occasion the vacancy.

If the vacancy is occasioned by the death of a member, it is said, in the room of such an one deceased: If it is occasioned by acceptance of an office, it is said, in the room of such an one, he having accepted such an office: If it is occasioned by the incapacity of the late member, it should say, in the room of such an one *incapable of being elected*. And in like manner with respect to other causes of vacancy.

It is evident, therefore, that the Freeholders of Middlesex could neither be supposed ignorant of the fact, or of the law. Having elected a representative again and again, after a legal declaration of his incapacity, in contempt of the jurisdiction of the House, and in direct opposition to the Law of the Land, no presumption could be made in their favour. Such a flagrant mis-user of their franchise, at least amounted to a non-user; their votes must be considered as thrown away; and the person next upon the
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poll, having the majority of legal votes, could only, in point of reason and law, be considered as duly elected.

Had there been, in this case, no line chalked out to direct the determination of the House, yet the necessity of the occasion would have dictated such a decision, in order to maintain their own jurisdiction, on which the liberties of the people depend, against the contumacy of a set of mistaken persons, who were instigated to betray their own interests.

But though the reason and necessity of the case would have sufficiently justified the proceedings of the House, yet they did not act without precedent.

On the 20th of May 1715, in the case of the election for the borough of Malden, the poll stood thus :

For Serjeant Comyns - 215

Mr. Tuffnell - 168

Mr. Bramston - - 215

Sir Will. Jollyffe 128

Serjeant Comyns having refused to take the oath of Qualification, they *resolved* that his election was void. But what did they farther in this case? why, they did not issue a new writ! But they considered the votes given for the Serjeant as thrown away: And *resolved*, That Mr. Tuffnell, who had a lesser number of votes than the Serjeant, was duly elected.

Again, on the 14th of February 1727, and 16th of April 1728, in the case of the election for the town of Bedford, the poll stood thus :

For Mr. Ongley - - 465

Mr. Orlebar - - 240

Mr. Metcalfe - 462

Mr. Brace - - 236

It appearing that Mr. Ongley held an office in the Customs, and the 12 and 13 W. 3. c. 10. against Officers in the Customs sitting in Parliament being read, and no surrender appearing to have been made of the said office, before the election, the House *resolved*, That Mr. *Ongley* was incapable of claiming to sit in Parliament. Therefore, though he had the majority of votes, they considered those votes as thrown away: And *resolved* farther, that Mr. Metcalfe and Mr. Orlebar were duly elected, though Mr. Orlebar had a lesser number of votes than Mr. *Ongley*.

As it is always to be wished, that there should be a harmony and correspondence of judgment in the several courts of judicature throughout the kingdom, so, happily in the present instance, the adjudications of the courts
of

of Westminster perfectly agree and correspond with the determinations of the House of Commons.

In the case of the King against the Mayor and Aldermen of Bath, the 15 Geo. 2. Mr. *Taylor* brought a *mandamus* to be admitted and sworn into the office of one of the Aldermen of the city of *Bath*. To which it was returned, that he was not duly chosen; and upon that issue being joined, it was tried before Lord Chief Justice *Lee*.

It appeared at the trial, that by the charter of the corporation, the Aldermen are to be elected by the Mayor, Recorder and Aldermen, or the major part of them; but it was agreed that the presence of the Recorder was not necessary. It was given in evidence to the jury, that the whole number of electors were *thirty*, of whom *twenty-eight* were lawfully assembled for the election of an Alderman:—That for this office there were three candidates, Mr. *Bigges*, who had 14 votes, the said Mr. *Taylor*, who had 13, and Mr. *Kingston*, who had *one* vote; but that Mr. *Bigges* was not duly qualified to be elected into this office, being neither a freeman of the corporation, nor an inhabitant of the city of *Bath*.

One *Bish*, and another witness, gave evidence that they made the objection to *Bigges*, at the time of the election; and that the electors, at the time the candidates were proposed, discoursed among themselves about *Bigges*, as a person not qualified.

On the other side, there was one witness who was present at the time, and denied that he heard any such notice given by *Bish*.

Upon the whole of this case, Lord Chief Justice *Lee*, one of the most cautious Judges that ever presided in a court, and whose judgments are held in the highest esteem, gave the following direction to the jury.—

That if they were satisfied the electors had notice of this want of qualification in *Bigges*, that then the 13 votes for *Taylor* were to be looked upon as sufficient to determine the election in his favour; and he told the jury, that if they thought the 14 had voted for a person, *whom they knew to be unqualified, at the time they voted for him, their votes must be considered as thrown away, and they were to be deemed as not voting at all, or as consenting to the election of Taylor*: For that their dissent could no way be regarded, because *their voting for a person not qualified, was the same as if they had voted for a person not existing, or dead*. And therefore they could not be considered as voting against Mr. *Taylor*, since no man could vote against another, but by voting for somebody else. So that, on the whole, he considered these 14 votes as flung away, and of no more avail than if they had not voted at all.

Upon this, the jury found a verdict for Taylor; and a motion was afterwards made for a new trial.

On shewing cause against the motion for a new trial, several laws were cited in support of Lord Lee's direction to the jury. Among others, the case of the *Queen and Hugh Boscawen* was cited, from a note of Mr. *Werg's*, which was an information, in the nature of a *quo warranto*, against Mr. *Boscawen*, to shew by what authority he exercised the office of one of the capital Burgesses of *Truro*, in the county of Cornwall. It appeared on shewing cause, that Mr. *Boscawen* had 10 votes, and that one Robert D—— had 10 likewise; but that no person was capable of being elected unless he was, at the time of the election, an inhabitant of the borough. Mr. *Boscawen* had a house near the town, but was not an inhabitant of the town; and though the Court might have granted the information against Mr. *Boscawen*, on the foundation of an equality of votes, yet, Lord *Parker*, on making the rule absolute, said, "*He considered those 10 votes for the unqualified person as thrown away, and that the other person was duly elected; from which the rest of the Court did not dissent.*"

The case of the *King and Withers*, likewise, the 8th Geo. 2. while that eminent lawyer Lord *Hardwicke* was Chief Justice, was cited. This was an information in the nature of a *quo warranto*, against one *Withers*, for taking upon him the office of one of the capital Burgesses of W——.

It appeared, on shewing cause, that by the ancient usage of the borough, whenever there was a vacancy of a capital Burgess, the Mayor had a right to nominate two persons, out of which two persons, and no other, the Mayor and Burgesses choose one to fill the vacancy.

The defendant *Withers* and another were nominated by the Mayor, pursuant to the custom. The defendant had five votes, and the other person nominated by the Mayor had but *one*. But there were six other burgesses who insisted to vote, and did vote, for a person not nominated by the Mayor. The Mayor, however, refused to take the poll for the person not nominated by him.

The court held, that *the six votes for the persons not nominated by the Mayor were thrown away*, and on that foundation discharged the rule.

In the end, upon the sound reasoning in Lord Lee's direction, and the authority of these cases, the court were unanimous in refusing to grant a new trial.

But, independent of these great authorities, it is clear upon the principles of common
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common sense, that a vote given for a person disqualified cannot be a legal vote. For to constitute a legal vote two requisites are essential: 1. That there be a capacity in the elector giving the vote; and 2. That there should be a capacity in the candidate receiving it. Mr. Wilkes, therefore, having no capacity to receive the votes, they were clearly illegal, and must be considered as thrown away.

Nay, indeed, it has been admitted on the other side, that they were thrown away: for, on the question whether the foregoing elections of Mr. Wilkes were null and void, they were, without a division, determined to be null and void; which was, in fact, determining that the votes given for him were thrown away.

Still it is answered, on the other side, that if they were not good votes *for* Mr. Wilkes, they were nevertheless good votes *against* Mr. Lutterell.

On any other occasion one might be ashamed to mispend time in answering such futile objections. Did ever any one hear of votes having a *negative* quality? Suppose, on Mr. Lutterell's being proposed, a number of electors had cried out, No! could a *negative* of this kind be considered as a vote against him? Certainly not. There is no way, as was said by Lord Lee, of voting *against* a person, but by voting *for* some other: and if a number of electors might put a negative upon a candidate in such a manner, they might keep a seat in parliament vacant as long as they pleased; whereby they might deprive not only their fellow electors, but the state, of the assistance of a member.

It is contended, however, that admitting these votes not to be good, yet the election should have been declared void, and Mr. Lutterell should not have been received. To prove this, they say it has been held that the voting for a person under age, who had a majority, did not make the next person elected, who had the minority.

To this it may be answered, That every case must depend on its own circumstances. Where indeed the incapacity is of such a nature as can only be ascertained by evidence, there, though the candidate having the majority should appear to have been ineligible, yet perhaps his competitor, having the minority, should not be received; but the election should be declared void. Because it may be presumed, that had the incapacity been previously known, the majority might have made choice of some other person.

Thus, in the case of a minor, if such a candidate be so near being of age, that no man can, upon view of his person, determine whether he be of age

or not, and if no certificate, or other proof of his minority, be produced, in a case of such uncertainty, it would perhaps be too much to say that the votes for him were thrown away, and that the next candidate should be admitted.

But if in this case any certificate, or other good evidence of his minority, be produced, or if a candidate be so young, that his minority is notorious and apparent, in these cases the votes should be considered as thrown away, and the next candidate should be received.

The true criterion of distinction is, whether the incapacity be or be not notorious of itself, and, if not notorious of itself, whether there was, or was not, notice of it? If it be notorious of itself, or if it appear that the electors had notice of it, in either case it must be considered as an obstinacy and contumacy in the electors, to vote for a disqualified person; their votes, therefore, must be deemed as thrown away, and then the next candidate should be received.

The House of Commons therefore, in such cases, will use their discretion; and if they are satisfied upon evidence, that the electors had notice of the incapacity of the disqualified person at the time they voted for him, they will reject their votes; and if there be any other candidate, though with a lesser number of votes, they will, as has been done in the cases above cited, admit him.

But it is said on the other side, that in the case of Mr. *Walpole*, who was returned after he was expelled, the House did not receive Mr. *Taylor*, the other candidate, but declared the election void.

True; but this case is by no means applicable to that of the Middlesex election. For though Mr. *Walpole* was returned after expulsion, and though, as has been contended, the incapacity was the necessary effect of the expulsion, yet in as much as this was the first and only instance in which the electors of any county or borough had returned a person expelled to serve in the same parliament, and the electors might be presumed not to have due notice of the effect of expulsion, the House gave them an opportunity to correct their error, by giving express notice, and by resolving, that *he was* thereby *incapable* of being elected, and at the same time declaring the election void.

It may be said, indeed, that by their voting for a person ineligible, a right attached, by operation of law, in Mr. *Taylor*. But a right of this kind in an individual, standing in competition with the rights of so many electors, and the law, with regard to the effect of expulsion, having never been before declared, it was proper and just in the House to give the electors, who had
voted

voted for an incapable candidate, an opportunity of making a new choice, after the law creating the incapacity had been expounded.

But this their resolution leaves no room to doubt what part they would have taken, if, upon a subsequent re-election of Mr. Walpole, there had been any other candidate in competition with him. For, by their vote, they could have no other intention than to admit such other candidate; otherwise their vote would amount to a resolution that the seat should remain vacant during that parliament.

But how unlike to this is the present case! In the present case, the House, with the same moderation, explained the effect of the expulsion, by declaring that Mr. Wilkes *was* thereby *incapable* of being elected. Still, however, after the fullest notice, after he had been again and again declared incapable of being elected, they obstinately persisted in choosing him.

Therefore, as there was not the least colour for presuming that they had not notice of his incapacity, and as Mr. *Lutterell* stood next upon the poll, the House could not, without injustice to him, without betraying their own jurisdiction, without violating the precedents of Parliament, and the corresponding determinations of the Courts at Westminster; in short, without opposing the principles both of reason and law, they could not act otherwise than they did.

In truth, there was no alternative but to admit Mr. *Lutterell*, or to refuse issuing a new writ. To have rejected Mr. *Lutterell*, after the law in such cases had been expounded, would have been to have denied him his right: To have refused issuing a new writ, would have been a violation of the rights of the Freeholders. By arbitrarily keeping seats vacant, the House may be purged, as in Oliver's time, to any degree a minister thinks proper: And this mode of proceeding, which some pretended patriots affect to prefer, would have been, as has been said, not only unjust with regard to Mr. *Lutterell*, but dangerous and unconstitutional with respect to the people.

Nevertheless it is pretended on the other side, that though the rejecting the person returned, and receiving the other candidate, might have been right, had the person rejected been disqualified by act of Parliament, yet it is otherwise, as he is disqualified only by the judgment of the House. By this means, they contend, the franchises of the electors are taken away, which nothing but an act of Parliament can do; for that the House, being but one of the three branches of the legislature, cannot make laws to bind the people; and that though their orders and resolutions are binding upon themselves, yet they do not operate without doors.

In answer to this, it is to be observed, that though the House of Commons, in their *legislative* capacity, as one only of the three branches of the Legislature, cannot, as has been said, *make* laws to bind the people, yet it is to be remembered, as was stated in the beginning, that they have a *judicial*, as well as a *legislative* capacity, and it is in their *judicial* capacity that they take cognizance of elections. Considered therefore as a *Court of Judicature*, their adjudications are as obligatory as the judgments of any other court whatever; nay, more so, as has been intimated, because they are without appeal.

To shew, however, that the judgments of Parliament are not binding without doors, they are extravagant enough, on the other side, to cite the case of the King and Queen against *Knollys**, commonly called *Lord Banbury's* case, which was shortly thus:

Charles Knollys, Earl of Banbury was indicted for the murder of *Capt. Lawson*, by the name of *Charles Knollys*, Esq; and this indictment was removed into the *King's Bench*, where the defendant pleaded in abatement, that he was a Peer. To which it was replied, that the defendant had *petitioned* the Lords in Parliament, to be tried by his Peers; upon which the Lords, by an order of their House, disallowed his peerage; and dismissed the petition. To this replication there was a demurrer, and a joinder in demurrer. Notwithstanding this order of the Lords, however, judgment was given for the defendant, and the indictment abated.

But the grounds on which the Court rested their opinion, as expressed by Lord Holt, was that the *order* of the Lords was not any determination, for that the cause was not properly before them: It was not properly before them, because the petition was preferred to the Lords, in *the first instance*; whereas it should have been preferred to the King, and from his Majesty have been referred to the consideration of the Lords: So that the petition to the Lords, was *coram non judice*.

This case, therefore, is not applicable to the case in question in any point whatever. For, in *Lord Banbury's* case, the reason, it is seen, which influenced the court, was, that the proceeding coming irregularly before the House of Lords, their order thereon was not a *judgment* of the House. From whence it is to be inferred, that if, in this case, the Lords had acted judicially, in a matter regularly laid before them, the court would, and they certainly must, have taken notice of their *judgment*. But, in the present case, the House of Commons acted as a *Court of Judicature*, in a cause regularly before them; their declaration therefore was the adjudication of the court; and the

* Salk. 47, 509, 512. 3 Salk. 242. Carth. 297. Comb. 273. Skin. 336, 517. Cas. T. R. 55. Holt 530.

adjudication of a court having competent jurisdiction, more especially of a court without appeal, is the *Law of the Land*.

It has already been observed that there are in this kingdom, as in most others, divers laws for the administration of government.

Will any one say, that the *Common Law* is not as binding as the Statute Law? that the *customs of particular places* are not of equal force with the Statute Law? And will any one say, that the *Law of Parliament* is of less force and efficacy than the Statute Law? Are not all equally the *Law of the Land*? And does not the jurisdiction of the House of Commons, in matters of elections, stand upon as firm a footing as the jurisdiction of any other court in the kingdom? nay, has it not been recognized again and again by the Statute Law?

If it be asked when, and how they acquired this jurisdiction; the answer is, That they gained it at the same time, and by the same means that they gained their right of impeaching the greatest personages in the land; at the same time, and by the same means, that they acquired the right they exercise with regard to money bills, and other undoubted privileges. In short, their jurisdiction in this respect, which is confirmed by immemorial usage, is as ancient as the *Common Law*, and must be so deemed, for no written law can be produced which shews the commencement of the institution: It is coeval with the constitution, and without such a jurisdiction the House of Commons, as has been shewn, could not exist as an independent body: And if this jurisdiction is questioned, all their other privileges may, on as good a foundation, be disputed; since these, *together with many privileges of the other House*, can only be supported by immemorial usage.

As to the pretence that the House, by the exercise of this jurisdiction, have taken away the franchises of the electors, which nothing but an act of Parliament can do, this insinuation is altogether fallacious.

Is the prohibiting of them from exercising their franchise against law the same thing as depriving them of it? Is it not necessarily understood in the exercise of every franchise, that it shall not be used contrary to the rules of law?

In the present instance, they exercised it so clearly contrary to the rules and reason of the law, that, independent of the declaration of incapacity by the House, the sheriff might, on the authority of the case of *Leimster*, above cited, have even *refused to have taken any poll* for Mr. *Wilkes*, and even that would not

have avoided the election; but any other candidate, having a majority of legal votes, would have been duly elected.

But how does the determination of the House deprive the electors of their Franchise? No one disputes their right: All that is contended is, that they have exercised their *right* : *INEFFECTUALLY*. Their right, as has been said, is to vote for whom they please, *being duly qualified*, to represent them. But they have wilfully and obstinately, with their eyes and ears open, voted for one disqualified, and of whose incapacity they were not only bound by law to take notice, but of which notice was actually and repeatedly given them.

Their votes therefore, on this occasion, must be considered as not given at all. But still, though, in strictness of law, perhaps, a wilful misuser of a franchise is a cause of forfeiture, yet no one contends that their franchise is hereby forfeited. No one means to take away their franchise: They have still the right of voting, on any future occasion, for whom they please, being duly qualified. But surely no one will contend that the electors of Middlesex are above the law; and that their Will is to over-rule the sense of the people at large, declared by their representatives.

But it has been said, and an obsolete act of Hen. the 4th has been cited, which declares, that "All elections shall be free without being interrupted by the *Pope*, or by *commandment of the King*;" much less, say the objectors, ought elections to be interrupted by *commandment of the House of Commons*.

One would suspect, by the levity of such arguments, that they who use them really meant to betray the cause which they affect to support. That Elections should be free, no one will dispute; but the freedom here spoken of, is a freedom limited by law.—That the *Pope* should interfere with Elections, we have no reason to fear: as little reason have we to apprehend, that our Sovereign will interrupt the free course of Elections. Nevertheless, it was provident in our forefathers to declare any commandment of the King to be illegal; for should a commandment of that kind be admitted, it would directly tend to destroy the independence of the House of Commons; *so would the influence of any other power whatever*. But the objectors are to learn, that the *resolution*, or the *commandment*, if they choose to call it so, of the House of Commons, is not against law, but declaratory of the law of the land. They are the proper and sole judicature, entrusted with the exposition of the law in such cases.

When the jurisdiction of the House, however, can no longer be disputed, attempts are made to alarm us with the dreadful consequences, which, as some affect to apprehend, may ensue from it. At this rate, say they,

they, the House of Commons may declare that no freeholder under 10 *l. per annum* shall vote at an election for a knight of the shire.

If they were serious in this apprehension, it might easily be removed, by assuring them that the Stat. of Hen. the VIth having fixed the qualification of the freeholders at 40 *s. per annum*, it is not in the power of the House of Commons, nor of any judicature whatsoever, to alter it: The *Legislature* only can enlarge or diminish the qualification.

There must, in all cases, ultimately be a power of judicature some where, without appeal; and wherever the constitution has thought proper to vest it, it is not supposed that it will, or ever can, be exercised against the express letter of the law.

Upon the whole, whether the jurisdiction of the House, with respect to Elections, be examined on the foundation of parliamentary precedents and authorities of law, or on the general grounds of reason and constitutional policy, it is evident that they have, and ought to have, the sole and exclusive right of judicature in all such cases: that it cannot, consistent with the preservation of public liberty, be lodged an where else; and that, in the instance in question, they have exercised this right not only according to the established law and usage of Parliament, but in conformity with the adjudications of the Courts at Westminster, on the like occasions.

It is scarce to be credited, that in these days, which we boast of as enlightened, the public should be so far misled as to question the exercise of a jurisdiction, on which their own welfare and security depends.

But what shall be said of those, who have employed every artifice thus to mislead and irritate the minds of the public, and who industriously augment the difficulties of administration, by obliging the ministry to pay that attention to their interested opposition, which might be better employed in improvements for the public good!

If Lord *Coke* had reason to lament that "much time was spent in Parliament concerning the right of Elections, &c. which might be more profitably employed for the public good *," how would he have lamented, had he lived in these days, to have seen *one Election* only consume so considerable a portion of a long session of Parliament; and to have known, that this deplorable waste of time was occasioned by the opposition of a party, who laboured to force a member upon Parliament *against law*, whom they themselves had caused to be expelled!

* 4 Inst. 49.

What fruits are to be expected from such a flagrant inconsistency of conduct?

However strongly such a party may be united at present, by a common interest, the pursuit of profit and power, yet when they come to a distribution of that power and that profit, how soon would they divide! Their different views, dispositions and passions, would quickly set them at variance; new factions would be formed; new discords would arise; and the public interest be sacrificed to private views and resentments.

These consequences are obvious to the discerning and dispassionate part of the people, who, unhappily for the affairs of mankind, seldom compose a majority.

It is to be hoped, however, that, before it is too late, the public judgment will be corrected. They will then find, that the persons whom they have been persuaded to consider as the invaders of their rights, are in truth the assertors and protectors of those rights; and they will then know, in what estimation to hold those, who, by every unwarrantable artifice, have laboured to inflame their minds with representations of imaginary grievances, at the very time that, by a selfish opposition, they were retarding real misery upon them and their posterity.

F I N I S.

